93-442

NO.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

PATRICIA B. FARR

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

PATRICIA B. FARR
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QUESTIONS PRESENTED

1. CAN THE DISMISSAL OF CAUSES OF ACTION BY A DISTRICT COURT BE SUSTAINED WHEN NO REASON IS GIVEN, AND, INSTEAD OF ADDRESSING THE CAUSES, BOTH THE DISTRICT AND APPELLATE COURT SIMPLY IGNORE THEM?

2. DOES 28 U.S.C 2410(a) (QUIET TITLE AGAINST UNITED STATES) APPLY TO PROPERTY WHICH HAS COME INTO THE POSSESSION OF THE INTERNAL REVENUE SERVICE?

3. DOES SECTION 6103(k)(6) OF THE INTERNAL REVENUE CODE ALLOW FOR DISCLOSURES OF RETURN OR RETURN INFORMATION BY THE INTERNAL REVENUE SERVICE WHEN SUCH DISCLOSURES ARE MADE IN PURSUIT OF UNAUTHORIZED COLLECTION ACTIONS?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

PATRICIA B. FARR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEAL

OPINIONS BELOW

The opinion of the appellate court is published at 990 F.2d 451, and is reprinted in the appendix (p. 11). The order denying the petition for rehearing was not published, and is reprinted in the appendix (p. 33). The order and opinion of the district court is reprinted in the appendix (p. 23).

JURISDICTIONAL GROUNDS

Petitioner, Patricia Farr, in proper person, respectfully petitions this Court for a Writ of Certiorari to review the judgement rendered in this case by the Ninth Circuit Court of

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* United Air Lines, Inc. was also a party to the case below, but is not a respondent here as no issue raised involves it.

Appeals. The opinion was entered on March 29, 1993. Petitions by all parties for rehearing were denied on June 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 26 U.S.C. 6103(a), 6103(k)(6), 6213(a), 6303(a), 6331(a) and 7431(a), 28 U.S.C. 2410(a) and 2463. The statutes are reprinted in the appendix (p. 34).

STATEMENT OF THE CASE

On June 30, 1987, the Internal Revenue service (IRS) began issuing a series of "notices of levy" to petitioner's employer, claiming that she owed various amounts of tax for the years 1979, 1980, and 1982. Based on these notices, petitioner's employer allegedly began sending the IRS large portions of her paychecks. On January 7, 1988 the IRS recorded a tax lien notice, alleging the amounts it claimed for all periods had ripened into a federal tax lien.

Petitioner filed a complaint in the district court on December 4, 1990 to quiet title to her property against the liens asserted by the United States. Petitioner also sought damages for unauthorized disclosure of tax information under 26 U.S.C. 7431, injunctive relief against any further levies on her paychecks, and the return of monies which had already been collected by the Internal Revenue Service (IRS) for the periods at issue.

The complaint alleged the United States had failed to issue petitioner a deficiency notice for 1982. Therefore, any collection action for that period was barred by 26 U.S.C. 6213(a). It also alleged that, for all periods, there had been no assessment of anything regarding Farr, as required under 26 U.S.C. 6203 (and 26 C.F.R. 301.6203-1), and that no notice/demand for payment had been made as required by 26

U.S.C. 6303(a). Therefore, no lien actually existed, no collection action was authorized, and Farr was entitled to the return of those monies already taken through the IRS' unauthorized levy action.

The jurisdiction of the district court was invoked under 28 U.S.C. 1331, 1340, 1346, and 2463, with sovereign immunity waived under 5 U.S.C. 702 (administrative review), 26 U.S.C. 6213(a) (injunctive relief for lack of deficiency notice), 26 U.S.C. 7431 (damages for unauthorized disclosure of tax information), 28 U.S.C. 2410(a) (quiet title), and 28 U.S.C. 2463 (actions regarding property seized or detained under an internal revenue law).

The United States moved to dismiss the complaint, arguing lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. It also moved, in the alternative, for summary judgement. The district court dismissed the case for failure to state a claim upon which relief could be granted. However, in doing so, it based its decision on matters outside the complaint, namely, a summary record document the government had made up just for litigation called "Certificates of Assessments and Payments". Also, in dismissing the entire case, it made no mention whatever of Farr's action for injunctive relief under 26 U.S.C. 6213(a), nor her action for damages under 26 U.S.C. 7431, nor the action for refund/return of the collections already made by the IRS' levy actions.

On appeal, the Ninth Circuit summarily affirmed the dismissals of all the causes of action against the United States except the one to quiet title under 28 U.S.C. 2410(a). As to that action, the court also held no quiet title action will lie as to amounts that have come into possession of the IRS. In affirming the dismissal of the causes of action for injunctive relief under 26 U.S.C. 6213(a), and for refund/recovery of seized property, the court *failed to even mention or discuss them at all*. In affirming the dismissal of the action for

damages for violating 26 U.S.C. 6103(a) (unauthorized disclosure of tax information), it essentially held that disclosures made in pursuit of both legal *and illegal* collection actions are authorized under §6103(k)(6). Therefore, no cause of action for damages under §7431 will lie for disclosures made in the form of lien and levy notices, even if those notices are illegal due to the IRS' failure to give statutorily required pre-levy/lien notices. 990 F.2d at 455.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari in this case because the appellate court has rendered a decision which conflicts not only with decisions of other appellate courts on the same matter, but also with its own prior decisions, as well as decisions of this Court. Further, the appellate court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. Departure From The Accepted And Usual Course of Proceedings.

In the normal course of judicial proceedings, an appellate court would not summarily affirm the dismissal of causes of action without even mentioning or discussing them. Yet, this is precisely what happened with Farr's causes of action against the United States for (i) injunctive relief under 26 U.S.C. 6213(a), and (ii) refund/recovery of the IRS' collections from its illegal levies. First, the district court dismissed the entire suit without even mentioning these causes of action, then the appellate court also turned a blind eye to them. Although Farr brought up these issues in her opening brief, and again in her petition for rehearing, the appellate court simply ignored the issues, and denied the rehearing request. Are the court's of this country, particularly appellate courts, allowed to dispose of causes of action by simply ignoring them and refusing to address them? Farr contends this to be such a severe departure

from the normal course of proceedings as to call for the exercise of this Court's power of supervision under Rule 10.1(a). This Court should vacate the appellate court's affirmance of those dismissals, and order the appellate court to conduct a rehearing on the matters.

B. Conflicting Decisions Regarding Application Of 28 U.S.C. 2410(a)

Part of Farr's suit sought to quiet title to, and the return of, her property on grounds of the IRS failure to comply with the prerequisites for collection by levy on the theory that any such collections were illegal. Relying on its prior decision in Hughes v. United States, 953 F.2d 531 (9th Cir. 1992), the appellate court held that "no quiet title action will lie" regarding "amounts that have already come into the hands of the IRS." 990 F.2d at 453. Farr believes the decisions it made in the instant case (and in Hughes) conflict with the decision it made in Goodwin v. U.S., 935 F.2d 1061 (9th Cir. 1991).

In Goodwin, the IRS purportedly seized Goodwin's real property for non-payment of payroll taxes. A public auction sale was held on August 5, 1986, where the property was declared sold to the United States. 935 F.2d at 1063. A district director's deed was recorded by the IRS in the county recorder's office *on March 24, 1987*. Id. Thus, the property had clearly "come into the hands of the IRS".

On *May 26, 1989* Goodwin filed a complaint seeking to enjoin the IRS from selling the property, and to quiet title. The district court denied the request for the injunctive relief. Goodwin did not immediately appeal or seek a stay of the court's ruling. Id. The government was subsequently granted summary judgement to which an appeal was made. Id.

On appeal, the Court ruled that although Goodwin's failure to attempt to preserve the status quo prevented it from giving any relief on his request for injunctive relief, it could nonetheless "still determine the validity of the seizure and lien

foreclosure sale through which the government obtained a District Director's Deed", a deed which had issued in 1987. Id at 1064 (emphasis added). The Court expressly held that the "action was correctly instituted under 28 U.S.C. §2410(a)(1) to quiet title to the property". Id. Thus, even though the property had clearly "come into the hands of the IRS", the Court held that a quiet title action under §2410 was "correctly instituted". Yet, in the instant case, as well as in Hughes, the same court held no quiet title action will lie regarding property that has "come into the hands of the IRS".

The decision also conflicts with that made in Kulawy v. United States, 917 F.2d 729 (2d Cir. 1990) wherein an action under §2410 was instituted *after* the IRS had seized Kulawy's property. Id. at 731. Notwithstanding the seizure, that court held the action was still proper under the statute because the government had a lien on the property *at the time the action was initiated*. Id. at 733-4. Surprisingly, the Kulawy court cited a case from none other than the 9th Circuit itself in support of its decision. Id. at 734 (citing Bank of Hemet v. United States, 643 F.2d 661 (9th Cir. 1981)). Also see United States v. Sullivan, 333 F.2d 100 (3d Cir. 1964) (levy on insurance policies did not transfer all rights of taxpayer).

Thus, not only is there a direct conflict among the circuits with the decision rendered in this case (and in Hughes) regarding the application of quiet title actions under §2410(a), but there is a conflict within the 9th circuit itself, a conflict which that court is apparently unwilling to address. Since the Ninth Circuit will not address its own internally conflicting decisions, this Court should exercise it power of supervision to resolve the matter.

In addition to having conflicting decisions within and among the circuits, the decision in the case at bar also conflicts with decisions of this Court regarding the title/ownership of property which has been levied by the IRS. This Court has held that the levy provisions of the Internal Revenue Code "do not transfer

ownership of the property to the IRS." U.S. v. Whiting Pools, 462 U.S. 198, 210 (1982). "They are provisional remedies that do not determine the Service's rights to the seized property, but merely bring the property into the Service's legal custody." Id at 211. Also see U.S. v. National Bank of Commerce, 472 U.S. 713, 728 ("the administrative levy ... is only a provisional remedy", and it "settles no rights in the property subject to seizure"). Under these decisions, it appears the mere seizure/levy of property by the IRS does not transfer ownership to it.

In its opinion in the case at hand, however, the appellate court held that no quiet title action will lie against amounts which have already come into the hands of the IRS on the theory that the government obtains a title interest in levied property. 990 F.2d at 453 (citing Hughes v. U.S., 953 F.2d at 538 [jurisdiction under §2410 is lacking over action regarding previously garnished wages because government claims title interest]). The appellate court's theory of title interest in levied property is in apparent conflict with this Court's prior decisions.

Petitioner has information and belief that there are several thousand actions across the country under §2410(a) regarding tax matters, and alleged illegal collection activity. Therefore, there is a high degree of general public interest in having this issue resolved.

C. Conflicting Decisions Among The Circuits Regarding Actions For Unauthorized Disclosure Under 26 U.S.C. 7431

Part of Farr's suit against the United States was regarding the disclosures of tax information made by the IRS via its lien and levy notices. Farr contended these notices violated the anti-disclosure provisions of 26 U.S.C. 6103(a) because the collection action was illegal due to the IRS' failure to issue any notice and demand for payment required under 26 U.S.C. §6303(a). Said notice is a prerequisite for any authority to levy under §6331(a). If the disclosures did violate the statute, the

United States would be liable for damages to Farr under 26 U.S.C. 7431.

In upholding the dismissal of this cause of action, the appellate court specifically withheld any determination as to whether the "IRS procedures were or were not defective". 990 F.2d at 455. Nonetheless, it summarily ruled that the information disclosed in the lien/levy notices for this case were "necessary to the collection activity", and fit "squarely within the exemption under section 6103(k)(6)." Id. This ruling has therefore made the IRS' compliance with statutorily required pre-levy/lien procedures irrelevant for purposes of liability in actions for unauthorized disclosures. Consequently, whether lien or levy notices are authorized or not authorized under an applicable statute, and the collection activity legal or illegal, no cause of action for damages under §7431 would exist under the appellate court's ruling, regardless of the possible illegality of the disclosures involved. [1]

A conflict among the circuits is developing for the extent of liability created for the disclosure of return and return information. The instant case apparently holds that disclosures made in the pursuit of allegedly illegal collections are authorized because such action is "necessary to the [illegal] collection activity." 990 F.2d at 455. This decision is in agreement with the decision made in Flippo v. United States, 670 F.Supp. 638 (W.D.N.C., 1987) aff'd without published

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[1] The court's ruling on this issue is indeed an anomaly when one considers that it reversed the dismissal of Farr's quiet title action, which alleged procedural irregularity in the IRS' collection activity (which Farr alleged made the collection illegal), but it nonetheless apparently held these same procedural defects were irrelevant as to the legality of the disclosures which resulted from the collection activity. This appears to be a contradiction.

opinion 849 F.2d 604 (4th Cir., 1988) (validity of underlying lien/levy is irrelevant to disclosure issue, even if levy made after tax was already paid); also see Weiner v. IRS, 986 F.2d 12 (2d Cir. 1993) (illegal/erroneous levy notices not actionable under §7431 since "computer error" by IRS employees which caused issuance of notices does not amount to negligence). However, all of these cases directly conflict with the 8th Circuit's decision in Rorex v. Traynor, 771 F.2d 383 (1983) (disclosures of tax information in pursuit of unlawful levy violates 26 U.S.C. 6103(a)). Further, the Ninth Circuit itself rendered a decision in conflict with the instant case when it reversed the dismissal of a similar case, and remanded for further proceedings in Blankstyn v. U.S., No. 91-16625 (decided Feb. 11, 1993; unpublished) (7431 cause cognizable in view of disclosures based on possible erroneous/invalid assessment).

Additionally, since the court held the disclosures in the case at bar were "necessary", and therefore fell under the exception to non-disclosure within §6103(k)(6), the decision conflicts with other appellate courts regarding the "necessity" of disclosures. Rodgers v. Hyatt, 697 F.2d 899, 904 (10th Cir. 1983) (6103(k)(6) only authorizes disclosures to the extent necessary *in obtaining information*); Chandler v. U.S., 887 F.2d 1397 (10th Cir. 1988) (affirming district court opinion which followed Rodgers); James v. U.S., 970 F.2d 750, 757 n. 13 (10th Cir. 1992) (if district court finds IRS lack of compliance with pre-levy procedure, it should address claim under §7431; Barrett v. U.S., 795 F.2d 446, 449-50 (5th Cir., 1986) (6103(k)(6) only authorizes disclosures necessary to *obtain* information and where information sought is not otherwise reasonably available). Obviously, the disclosures made via lien and levy notices would hardly be for the purpose of *obtaining* information. As can be seen, these decisions are fundamentally divergent on the construction and application of the §6103(k)(6) exception to the general rule of non-disclosure

expressed in §6103(a).

In view of this Court's opinion in Church of Scientology of California v. IRS, 484 U.S. 9 (1987), it has apparently considered the anti-disclosure provision of the Internal Revenue Code (§6103(a)) to be quite important. The Court recognized in that case that §6103(a) "lays down a general rule that 'returns' and 'return information' shall be confidential," and prohibits their disclosure *except as authorized by the code*. Id. at 10, 11-12. The Court further quoted a Senate Report which stated that 'returns' and 'return information' are "'not subject to disclosure except in those limited situations delineated in the newly amended section 6103.'" Id. at 16. From the above decisions of the appellate courts, it appears some of them are carving out exceptions which are *not* in the code, while others have refused to do so. Based on these decisions, the populace within one circuit has a civil remedy under revenue code section 7431 for such things as illegal/unauthorized collection activities, while those in other circuits are denied that remedy. Petitioner contends that Congress could not have intended an exception to §6103(a) which allows disclosures to be made in pursuit of illegal collections, or other disclosures not specifically authorized by the code. Since the general public has an ongoing interest in the resolution of this issue, this conflict among the circuits should be resolved by this Court.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to grant this petition for certiorari.

Date: September 1, 1993.

Submitted by,

Patricia B. Farr

Patricia B. Farr, In Pro Per

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA B. FARR,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA;
UNITED AIR LINES, INC.,
Defendants-Appellees

No. 91-36317

D.C.No.
CV90-0530-HLR

OPINION

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, presiding

Submitted February 4, 1993
Seattle, Washington

Filed March 29, 1993

Before: Thomas Tang, Alex Kozinski, and Ferdinand F. Fernandez, Circuit Judges.
Opinion by Judge Fernandez

COUNSEL

Patricia B. Farr, Pro Se, Laclede, Idaho,
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Gary R. Allen, Charles E. Brookhart, and Joel A. Rabinovitz, United States Department of Justice, Washington, D.C., for defendant-appellee United States of America.

Debra L. Boyd and Robert A. Siegel, O'Melveny & Myers, Los Angeles, California, for defendant-appellee United Air Lines, Inc.

OPINION

FERNANDEZ, Circuit Judge:

Patricia B. Farr brought this action against her employer, United Air Lines, Inc. (United) and against the United States after the Internal Revenue Service (IRS) levied upon her wages. The IRS claimed that Farr had unpaid federal income tax liabilities and United turned over certain monies that it was holding on her behalf. She asserts defects in the levy procedures and also asserts that United improperly turned over exempt funds. The district court dismissed her action. We affirm in part and reverse in part.

BACKGROUND

The IRS determined that Farr had not filed federal income tax returns for the years 1979 to 1982 and that she had tax deficiencies for those years. In due course, the IRS issued Notices of Levy which it served upon her employer, United. United duly sent funds it was holding on her behalf to the IRS, but her tax debt has not been fully discharged, so the levy on her wages remains.

Farr brought this action against the United States claiming, among other things, that the levies upon her wages were procedurally invalid and that the IRS had improperly disclosed taxpayer information. She also sued United. In that part of her action, she claimed that United had improperly turned over workmen's compensation benefits to which she was entitled in addition to her wages. She asserted, in effect, that United had converted those benefits. United has admitted for purposes of this appeal that it did, indeed, turn over workmen's compensation benefits.

The United States filed a motion to dismiss for lack of jurisdiction and for failure to state a claim. Fed. R. Civ. P.

12(b)(1) and 12(b)(6). In the alternative, it asked for summary judgment. Fed. R. Civ P. 56. In support of its motions it submitted copies of the "Certificates of Assessment and Payments"(certificates). The district court granted the motion on grounds that Farr had not stated a claim upon which relief could be granted. While it relied upon the certificates, it did not grant the motion for summary judgment.

United also moved to dismiss on grounds that pursuant to 26 U.S.C. 6332(e) it was immune from actions brought by disgruntled taxpayers like Farr, whose property had been turned over to the United States pursuant to a levy. The district court granted that motion also.

Farr then appealed the dismissal of her action.

JURISDICTION

"The existence of subject matter jurisdiction is a question of law reviewed de novo." Hughes vs. United States, 953 F.2d 531, 535 (9th Cir. 1992) However, "[t]he district court's factual findings on jurisdictional issues must be accepted unless clearly erroneous." Id.

A. UNITED

From the record before us, it appears that the district court did have jurisdiction over the conversion action against United upon, at least, diversity grounds. 28 U.S.C. 1332. We, however, do not intend to make that the law of the case if the district court, upon remand, shall determine that the facts are otherwise.

B. UNITED STATES.

It is clear that the district court did not have jurisdiction to entertain Farr's action to the extent that she sought an injunction or declaratory relief against the IRS. See Hughes, 953 F.2d at 535-37. It is true that an injunction may sometimes issue where there are no circumstances under which the

government could prevail on the merits and the taxpayer will suffer irreparable harm. Id. at 535. Nothing in the facts of this case even hints that those conditions could be fulfilled. Purely and simply, Farr did not pay her income taxes, or even file returns, despite the fact that she was earning significant amounts of income during the years in question.

We have held, however, that pursuant to 28 U.S.C. 2410(a) there can be jurisdiction over an action to quiet title to personal property when the IRS has imposed a lien and the taxpayer seeks to contest the procedural validity of that lien. Hughes, 953 F.2d at 537-38. Farr has made just such an assertion. However, as to amounts that have already come into the hands of the IRS, no quiet title action will lie. Id at 538. The United States argues that not even the continuing levy can support a quiet title action. We have held to the contrary. In Hughes we said that the taxpayer "can only use 2410 to challenge the continued collection of taxes through the garnishment of...wages." Id. at 538. See also James vs. United States, 970 F.2d 750, 755-56 n.11 (10th Cir. 1992).

Fortunately for Farr, that slight opening may be enough to allow her to squeeze through the otherwise closed jurisdictional gate.

As the district court stated, in her complaint Farr merely made the unsupported assertion that the IRS liens were procedurally invalid. The IRS, for its part, then filed the certificates, which indicated that the necessary procedures had been taken and that the notices had been mailed. The certificates showed Farr's address. Those certificates were proper evidence of the propriety of the assessment proceedings in all particulars. Hughes,953 F.2d at 539-40. However, although they were proper evidence, they were not necessarily conclusive evidence. Id. See Keado vs. United States, 853 F.2d 1209, 1213-14 (5th Cir. 1988) (introduction of mailing certificate, mailing log book and affidavit supporting mailing of notices sufficient to prove actual mailing of IRS notices). But

see United States vs. Wright, 658 F.Supp. 1,2(D. Alaska 1986) (date-stamped copy of IRS notice and memorandum discussing it not sufficient evidence to prove mailing). Farr did submit a declaration that she never received the required notices. Given that declaration, if evidence outside the pleadings was going to be considered, Farr should have at least been given the opportunity to conduct some discovery before judgment was entered against her. Indeed, the district court did recognize the fairness of allowing discovery and suggested that it was unlikely that it would preclude Farr from having discovery if the merits of her claim were in question.

The district court said it was granting the government's motion to dismiss because Farr had not stated a claim upon which relief could be granted. That is an indication that the government's motion under Rule 12(b)(6) was granted. But in ruling, the district court relied upon the certificates. However, evidence outside the pleadings, such as the certificates, cannot normally be considered in deciding a 12(b)(6) motion. See Baker vs. McNeil Island Corrections Ct., 859 F.2d 124, 127 (9th Cir. 1988) (review for failure to state a claim limited to complaint). Given Farr's pleading alone, it cannot be said that she failed to state a claim when she alleged that the IRS did not follow the required notice procedures. Therefore, the dismissal cannot be sustained on pure 12(b)(6) grounds.

Nor can we uphold the dismissal as being one on the merits. The district court said it was not ruling on the merits and that it was specifically denying the government's summary judgment motion.

We recognize that in actions against the united States a failure to state a claim may also indicate a lack of jurisdiction. Here, the United States did also bring a motion pursuant to Rule 12(b)(1), and it is proper for the district court to consider evidence outside of the pleadings for the purpose of deciding

a jurisdictional issue.[1] See McCarthy vs. United States, 850 F.2d 558, 560 (9th Cir. 1988), cert. denied, 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed. 2d 581 (1989). Nevertheless, the district court did not indicate that it was granting that motion. Moreover, just as it would have been fair to permit Farr to obtain some discovery if she were faced with a summary judgment motion on the merits, it would have been equally fair to allow her to obtain some discovery when faced with a 12(b)(1) motion. See America W. Airlines, Inc. vs. GPA Group, Ltd., 877 F.2d 793, 800-01 (9th Cir. 1989); Wells Fargo & Co. vs. Wells Fargo Express Co., 556 F.2d 406, 430-31 n.24 (9th Cir. 1977).

Thus, we cannot uphold the dismissal on the alternate ground of Rule 12(b)(1). Instead, we must reverse the district court's determination that in light of the IRS certificates Farr has not stated a claim upon which relief could be granted. In so doing we do not hold that Farr did or did not receive notices, nor do we hold that the IRS procedures were or were not defective.

In any event, the district court did have jurisdiction over the separate claim that an improper disclosure of return information was made. 26 U.S.C. 7431.

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[1] Of course, "where jurisdiction is so intertwined with the merits that its resolution depends on the resolution of the merits, "the trial court should employ the standard applicable to a motion for summary judgment.'" Careau Group vs. United Farm Workers, 940 F.2d 1291, 1293 (9th Cir. 1991) (citation omitted). See also Rosales vs. United States, 824 F.2d 799, 803 (9th Cir. 1987) ("A district court may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question prior to trial, if the jurisdictional facts are not intertwined with the merits." (Citations omitted.)

DISCUSSION

Two issues remain before us. First, did the district court properly dismiss Farr's claim that there was an unauthorized disclosure of her return information? Second, is United immune? We will consider each of these in turn.

A. DISCLOSURE OF RETURN INFORMATION

There can be no doubt that "returns and return information" are, generally speaking, confidential. 26 U.S.C. 6103(a). Moreover, a violation of the confidentiality restrictions will support a civil action for damages against the United States. 26 U.S.C. 7431(a)(1); See Maisano vs. United States, 908 F.2d 408, 410 (9th Cir. 1990)

While this right is important, it is not unlimited. Section 6103 provides for a number of exceptions. Among them is 6103(k)(6) which provides that the IRS may "disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available ... with respect to the enforcement of any other provision of this title."

Farr objects to the disclosure of return information in the notices of levy, copies of which were attached to her complaint. But the information disclosed in those notices of levy was necessary to the collection activity. Thus, it was squarely within the exemption under section 6103(k)(6). See Maisano, 908 F.2d at 410. Therefore, Farr's assertion that the United States was liable on this ground of her complaint must fail.

B. IMMUNITY OF UNITED.

The district court accepted United's claim that it was immune from any liability to Farr. In order to assess that claim, we must take a careful look at the statutory scheme. In so doing we follow the usual rule of statutory construction that it is the words of the statute which demand our scrutiny. See United States vs. Wilson, ___U.S.___, 112 S. Ct. 1351, 1354-

55, 117 L.Ed. 2d 593 (1992). Those are the words that we are required to effectuate. See Estate of Cowart vs. Nicklos Drilling Co., ___U.S.___, 112 S.Ct. 2589, 2594-98, 120 L.Ed.2d 379 (1992). We must follow the plain meaning of those words and need not look to legislative history where their meaning is clear on their face. See Connecticut Nat'l Bank vs. Germain, ___U.S.___, 112 S.Ct. 1146, 1149-50, 117 L.Ed. 2d 391 (1992). If the "statue speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." Estate of Cowart, U.S. at___, 112 S.Ct. at 2594; see United States vs. Galliano, 977 F.2d 1350, 1351-52 (9th Cir. 1992); Seldovia Native Ass'n, Inc. vs. Lujan, 904 F.2d 1335, 1341 (9th Cir. 1990).

When it comes to taxation, Congress has recognized that the flow of money into the coffers of the Treasury of the United States must be uninterrupted. It has therefore sought to remove all unnatural, and many natural, impediments to that flow. Taxpayers, like Farr, simply cannot decide that they are not going to pay their taxes. Whatever the state of their solvency may be, the solvency of the government must be assured to the extent possible. Therefore, Congress has made an expeditious administrative levy process available. The IRS may collect unpaid tax liabilities by resorting to the use of that weapon. See 26 U.S.C. 6331(a); see also United States vs. National Bank of Commerce, 472 U.S. 713, 720, 105 S.Ct. 2919, 2924, 86 L.Ed.2d 565 (1985). Section 6331(a) gives the IRS the power "to collect such tax...by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person...". Property exempt from levy includes "[a]ny amount payable to an individual as workmen's compensation...under a workmen's compensation law of the United States, [or] any state..." 26 U.S.C. 6334(a)(7).

Of course, a person's property interest may often be in the hands of another. Were the IRS precluded from reaching those interests, its collection efforts would often be stymied. Not

surprisingly, Congress has provided for that situation. The laws are designed to reach those interests and to encourage third parties to turn over the interests when the government issues a demand for them.

Thus, 26 U.S.C. 6332(a) provides that, in general, "any person in possession of (or obligated with respect to) property or rights to property *subject to levy upon which a levy has been made* shall, upon demand of the Secretary, surrender such property or rights... to the Secretary..." (emphasis added). If the person "fails or refuses to surrender any property or rights to property, *subject to levy, upon demand by the Secretary*," the person will become personally liable. 26 U.S.C. 6332(d)(1)(emphasis added). Penalties may also be exacted. 26 U.S.C. 6332(d)(2). Clearly, a refusal to honor the levy will be at the third person's own risk. Even in somewhat doubtful circumstances the liabilities and penalties may be imposed. See United States vs. Donahue Indus., Inc., 905 F.2d 1325, 1331-33 (9th Cir. 1990); see also id. at 1333-35 (Wallace, J., concurring and dissenting). As the Supreme court has indicated, the party in possession has limited defenses to a levy on a taxpayer's property interests and will proceed at his own peril if he refuses to honor the levy. National Bank of commerce, 472 U.S. at 721-26, 105 S.Ct. at 2925-27.

Of course, a third person put in that position might well complain that he is being forced to negotiate between the Scylla of IRS fury and the Charybdis of taxpayer vengeance every time a levy is made. Congress in its wisdom has made some provision for that difficulty. It has determined that:

> Any person in possession of (or obligated with respect to) property or rights to property *subject to levy upon which a levy has been made* who, upon demand by the Secretary, surrenders such property or rights to property...shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property

arising from such surrender or payment

26 U.S.C. 6332(e) (emphasis added).

The courts have pointed to that language and have interpreted it generously. See Johnson vs. United States, 566 F.Supp. 1012, 1014 (M.D. Fla. 1983) (trustees of a union vacation fund cannot dishonor a levy on employees' rights, and will have no liability in honoring it); Wechsler vs. Home Sav. & Loan Ass'n, 57 Cal. App. 3d 563, 567-69, 129 Cal. Rptr. 380 (1976) (third party cannot refuse to surrender amounts levied upon because account holder was a trustee for others; action against the third party is dismissed); see also National Bank of Commerce, 472 U.S. at 729, 105 S.Ct. at 2929. United relies upon this statutory scheme for its assertion that it is immune from Farr's suit. It relies in vain.

In the first place, the plain words of the statute indicate that third persons are protected only when they turn over property which is "subject to levy." But for our purposes the parties have agreed that the property was workmen's compensation benefits. Those benefits are not subject to levy. The are exempt. 26 U.S.C. 6334(a)(7). That is made even more clear by the whole statutory scheme. Section 6331(a) withholds from the IRS any power to levy upon exempt property. Section 6332(a) only requires third parties to turn over properties subject to levy and, of course, section 6332(e) only purports to protect a third party who turns over property subject to levy. No doubt Congress could have given third parties even more protection, especially if the IRS demanded a turnover of property that was actually exempt. Congress did not expressly do so. That leads us to the second flaw in United's argument.

In this case, the IRS did not even purport to levy upon Farr's workmen's compensation benefits. Quite the contrary. The "Notice of Levy on Wages, Salary, and Other Income" specifically provided that wages, salary and income were levied upon "only to the extent that they do not include amounts specified as exempt from levy under Code Section 6334..."

Thus, the IRS never did ask United to turn over Farr's workmen's compensation benefits--it eschewed any desire to have United do so. It is notable that the very statutes upon which United relies specifically provide that it need only turn over, and is only protected upon turning over, property "upon which a levy has been made..." 26 U.S.C. 6332(a) and (e). Here there was no levy upon the benefits themselves. Thus, this case is unlike those where the government *was* attempting to levy on the very property in question, and the third party was attempting to dishonor the levy. See Johnson, 566 F.Supp. at 1013 (the government *did* levy on benefits; the claim was that the taxpayer had an insufficient interest in them); Wechsler, 57 Cal. App. 3d at 565-67 (the government *did* levy on bank accounts; the claim was that the taxpayer had no personal interest in them). Therefore, nothing in the record before us supports a determination that United is, or should be, immune from liability to Farr.[2]

United also argues that the Anti-Injunction Act, 28 U.S.C. 7421, precludes this action against it. We do not agree. This is not a case where a taxpayer is attempting to prevent a third party from abiding by the tax laws or from acceding to the demands of the taxing authorities. Cf., Bright vs. Bechtel Petroleum, Inc., 780 F.2d 766, 770 (9th Cir. 1986) (employee sought to sue employer because it had withheld taxes in accordance with federal law); Maxfield vs. United States Postal Serv., 752 F.2d 433, 434 (9th Cir. 1984) (same). It is a case where the IRS has not attempted to collect taxes out of workmen's compensation benefits, but United has, nevertheless, taken it upon itself to send those benefits to the government. As far as this record shows, should Farr prevail against United it will be on account of its unbidden meddling with her

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[2] It goes almost without saying that United's request for attorneys fees must be denied.

property rights. That will not interfere in any way with the IRS's tax collection efforts.

CONCLUSION

It appears that despite the fact that she had substantial income from 1979 to 1982, Farr decided that she would not pay her taxes. The IRS was not amused. It took action to protect the fisc. By its efforts, it appears that the IRS has collected much of what Farr owes. However, she asserts that the IRS failed to give the notices required by law and, thus, that the continuing levy on her wages is procedurally invalid. Because she ought to have an opportunity to prove her assertion, we reverse the judgment dismissing that portion of her claim against the United States.

Nor can the dismissal of United stand. For our purposes, United agrees that, in effect, it turned over property that was neither subject to levy nor levied upon. Nevertheless, it claims that it can assert the defense of immunity. It cannot. Perhaps it can assert other defenses, but on this record we cannot tell. At any rate, the denouement of its litigation with Farr must await another day.

REVERSED as to the United States as to the claim that the continuing levy on wages is invalid, and otherwise AFFIRMED as to the United States. REVERSED as to United.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PATRICIA B. FARR,
Plaintiff,

vs.

UNITED STATES OF AMERICA, and UNITED AIRLINES, INC.,

Defendants.

_____/

CIVIL NO. 90530-NR-HLR

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

I. INTRODUCTION

On November 29, 1991, Mrs. Patricia B. Farr originally filed a pro se complaint against the United States challenging the procedural validity of a levy made upon her wages from United Airlines to satisfy payment of past due income taxes owed to the Internal Revenue Service. Thereafter, on February 26, 1991, Mrs. Farr filed an amended complaint naming as defendants not only the United States of America for wrongfully levying upon her wages, but also United Airlines, Inc., for wrongfully surrendering portions of her wages to the government. See First Amended Complaint to Quiet Title to Personal Property, and for Damages for Unauthorized disclosure of Confidential Information, filed Feb. 26, 1991.

Since the filing of Mrs. Farr's amended complaint, a myriad of documents have been filed herein, to-wit: (1) Motion to Dismiss or in the Alternative for Summary Judgment, filed by the United States on February 6, 1991; (2) Motion for Protective Order, filed by the United States on March 29, 1991; (3) A motion to dismiss, filed by United Airlines on April 9, 1991; (4) Plaintiff's Request for Judicial Notice; Supplemental

Opposition to United States' Motion for Protective Order; [and] Request for Sanctions, filed on June 13, 1991; (5) Plaintiff's Motion for Leave to Amend Complaint and Add Parties, filed on July 13, 1991; and (6) Plaintiff's Request for Judicial Notice of United States' Failure to Comply with Evidence Rule 1006; [and] Request for Deferral of Consideration of United States' Summary Judgement [sic] Motion, filed on July 22, 1991.

Having determined that the facts and legal arguments are adequately presented in the record currently before the court, and finding that the decisional process would not be significantly aided by oral argument, based on the analysis to follow, the motions pending herein shall be decided on the briefs.[1]

II. ANALYSIS

A. UNITED STATES' MOTION TO DISMISS

According to the United States' statement of facts, and undisputed by the plaintiff, Mrs. Farr did not file federal income tax returns and pay taxes for the years 1979 through 1982. Memorandum of Points and Authorities in Support of Motion to Dismiss, or in the Alternative, for Summary Judgment, filed Feb. 6, 1991, at 2. On October 9, 1986, after conducting an audit, the Internal Revenue Service (IRS) mailed a notice of deficiency to plaintiff, Patricia B. Farr, for the 1982 tax period. Id. According to the government, Mrs. Farr's liabilities for the 1979 through 1981 tax periods have been paid

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[1] At the outset, this court notes that it has spent a significant amount of time wading through the briefs, affidavits, and exhibits herein. Rather than restating each argument made by the litigants, however, the court will merely address those threshold issues which support a finding that this court lacks subject matter jurisdiction to restrain the tax assessments at issue.

pursuant to IRS levies on her wages. Id. However, as of the date of the government's memorandum, plaintiff's 1982 tax liability remained unpaid. Id.

Mrs. Farr never directly challenges the amount of back taxes sought by the United States. Instead, she carefully skirts that issue and makes clear that this action was brought to challenge the validity of the procedures used by the United States to secure the collection of such back taxes. Specifically, Mrs. Farr claims that no notice of assessment was issued, no notice of deficiency was issued, and that no notice of seizure was issued; and therefore, the United States had no right to seize any portion of Mrs. Farr's salary from United Airlines. With those arguments in mind, Mrs. Farr claims that this court has jurisdiction and that this action is barred neither by the Anti-Injunction Act, 26 U.S.C. 7421, nor the Declaratory Judgment Act, 28 U.S.C. 2201. Mrs. Farr maintains that all funds that have been collected thus far should be returned; that the Internal Revenue Service has improperly taken actions outside the geographical bounds of Washington, D.C., and therefore, the notice of tax lien and levy notices should be declared null and void. Mrs. Farr further maintains that she is entitled to punitive damages arising from the United States' unauthorized disclosure of information to United Airlines.

In its motion to dismiss, the United States contends that this court lacks subject matter jurisdiction over this action because, unless it consents to being sued, the United States is immune from suit. See, e.g., Elias vs. Connett, 908 F.2d 521, 527 (9th Cir. 1990) (citing Gilbert vs. DaGrossa 756 F.2d 1455, 1458 (9th Cir. 1985)). To the extent Mrs. Farr's complaint attacks the merits of the underlying tax assessments made by the IRS, the United States' position is clearly well taken. See, e.g., Aqua Bar & Lounge vs. United States Treasury, 539 F.2d 935, 939 (3rd Cir. 1976). Indeed, a taxpayer may only challenge the validity of a tax assessment by filing a claim in Tax Court, or, *upon fully paying the assessment*, in a refund

action in the district court or the court of claims. Zimmer vs. Connett, 640 F.2d 208, 210 (9th Cir. 1981) (citations omitted). Courts have consistently rebuffed taxpayers' attempts to circumvent that procedure. Id. (citations omitted).

In an effort to survive the motion to dismiss, Mrs. Farr adamantly maintains that this action does not challenge the *amount* of taxes owing, but instead challenges the *procedural validity* of the levy on her wages and, therefore, jurisdiction is not lacking. It is true that where a taxpayer states a cause of action pursuant to 28 U.S.C. 2401(a)(1) [sic] and sufficiently demonstrates a procedurally defective IRS levy, the consensus among federal courts has been that the United States has consented to being sued. See, e.g., Pollack vs. United States, 819 F.2d 144, 145 (6th Cir. 1987). However, where, as here, there is nothing more than bare allegations challenging the procedural validity of the actions of the IRS, a cause of action under 28 U.S.C. 2410(a) has not been stated and dismissal is clearly appropriate. Elias vs. Connett, 908 F.2d at 528.

The procedural framework for a valid tax lien requires first that the IRS make a valid assessment of taxes pursuant to 26 U.S.C. 6203. Upon reviewing the entire record, the court finds that the assessments of the IRS herein were valid. In support of its motion to dismiss, the United States submitted copies of Certificates of Assessments and Payments, setting forth the taxes for which Mrs. Farr was assessed. See Exhibit A, attached to Declaration of Thomas Moore, filed on Jan. 10, 1991 [hereinafter Exhibit A]. Where, as here, assessments and notices thereof have been detailed in the Form 4340, in the absence of contrary evidence, a presumption of correctness attaches thereto. See, e.g., United States vs. Nuttall, 713 F.Supp. 132, 135 (D. Del. 1989); United States vs. Zolla, 724 F.2d 808, 810 (9th Cir.), cert. denied 469 U.S. 830 (1984). See also Van Skiver vs. United States, 751 F.Supp. 1522 (D.Kan. 1990) (certificate of assessments and payments not considered hearsay in taxpayers' quiet title action).

The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C.S. 7421(a) (Law. Co-op. 1991). In an effort to preserve the government's ability to assess and collect taxes expeditiously, the Supreme Court now recognizes a single, narrow judicial exception to the Anti-Injunction Act. Church of Scientology vs. United States, 920 F.2d 1481, 1485 (9th Cir. 1990), cert. denied, ____U.S.___, 114 L.Ed.2d 711 (1991).

> [A]n injunction may be obtained against the collection of any tax if (1) it is "clear that under no circumstances could the government ultimately prevail" and (2) "equity jurisdiction" otherwise exists, i.e., the taxpayer shows that he would otherwise suffer irreparable injury.

Id. (quoting Commissioner vs. Shapiro, 424 U.S. 614, 627 (1976), quoting Enochs vs. Williams packing & Navigation Co., 370 U.S. 1, 7 (1962)).

Mindful of this standard, this court finds not only that Mrs. Farr has failed to demonstrate that under no circumstances could the government prevail on its claims, nor, based on the entire record, has she established that she will suffer irreparable injury, but on the contrary, other than *bare allegations* by the plaintiff that the United States did not give her proper notice and demand for payment, *nothing* in the record supports a finding that assessments and subsequent levies were procedurally infirm and should be disturbed. Accordingly, because Mrs. Farr has failed to state a cause of action pursuant to 28 U.S.C. 2410(a), the United States has not waived its sovereign immunity herein, and this action should be dismissed for failure to state a claim upon which relief may be granted.

Elias vs. Connett, supra at 528.[3]

B. United States' Motion for Protective Order

The United States moved for a protective order pending the resolution of the Motion to Dismiss or in the Alternative for Summary Judgment. However, finding that this court lacks subject matter jurisdiction over the complaint, further discovery is unnecessary and dismissal is clearly appropriate. Therefore, the Motion for Protective Order shall be deemed moot.[4]

---

[3] The United States framed its motion in the alternative as a motion for summary judgment. However, in light of the fact that subject matter jurisdiction is clearly lacking, this court need not reach the merits of the motion for summary judgment. Were this court to do so, there appears adequate bases in the record for entering judgment in favor of the United States. compare Egbert vs. United States, 752 F.Supp. 1010 (D. Wyo, 1990) (United States' motion for summary judgment granted where taxpayer contended that levies on his wages were unlawful due to inadequate notice and demand and sought to quite title to property seized from him); Maisano vs. United States, 908 F.2d 408 (9th cir. 1990) (Summary judgment in favor of United States affirmed in action arising from IRS disclosure of information about taxpayers).

[4] For the record, however, had this court found dismissal to be inappropriate, the United States should be aware that this court would not have been likely to grant its motion for protective order to the extent the government wished to preclude Mrs. Farr from discovery prior to consideration of the motion for summary judgment. Indeed, although this court finds plaintiff's position tenuous at best, were this court to reach the merits of her claims, she would have been given a full and fair opportunity to litigate such.

C. United Airlines' Motion to Dismiss

United Airlines has moved to dismiss Mrs. Farr's complaint on several grounds; however, because this court finds 26 U.S.C. 3402 to be dispositive, there is no need to discuss the other grounds for dismissal raised by United Airlines.

Under 26 U.S.C. 3402, an employer has a mandatory duty to withhold federal income tax from an employee's wages where required by applicable regulations. See Maxfield vs. United States Postal Serv., 752 F.2d 433, 434 (9th Cir. 1984); Chandler vs. Perini Power Constructors, Inc., 520 F.Supp. 1152, 1153 (D.N.H. 1981). The actions taken by United Airlines in withholding federal income tax from Patricia Farr's wages were fully in accordance with federal internal revenue regulations. This circuit has repeatedly held that an employer is not liable to an employee for complying with its legal duty to withhold tax. Bright vs. Bechtel Petroleum, Inc., 780 F.2d 766, 770 (9th Cir. 1986) (citing Stonecipher vs. Bray, 653 F.2d 398, 403 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982); Callow vs. Amerace Corp., 681 F.2d 1242, 1243 (9th Cir. 1982)).

Because the internal Revenue Code, 26 U.S.C. 3403, expressly provides that an employer is liable to the IRS for the payment of tax withheld, and "shall not be liable to any person for the amount of any such payment," suits by employees against employers for withholding taxes are "statutorily barred." Bright vs. Bechtel Petroleum, Inc., 780 F.2d at 770 (citing Chandler vs. Perini Power Constructors, Inc. 520 F.Supp. at 1156).

Accordingly, since Mrs. Farr fails to state a cause of action against United Airlines, its motion to dismiss shall be granted.

In conjunction with its motion, United Airlines also seeks attorney's fees incurred in this action. While such an award is clearly within the discretion of this court, based on the record and in light of the fact that the plaintiff is proceeding pro se, at this juncture the court will deny the request without prejudice. However, should Mrs. Farr choose to further pursue this action

before this court, or by way of an appeal before the Ninth Circuit Court of Appeals, sanctions may be appropriate.

D. Plaintiff's Motion for Leave to Amend Complaint

On June 13, 1991, plaintiff filed a Motion for Leave to Amend Complaint and Add Parties. On June 28, 1991, Defendant United Airlines filed its Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Leave to Amend, and on July 3, 1991, the United States filed a Memorandum in Opposition to Plaintiff's Motion for Leave to Amend Complaint and Add Parties.

Plaintiff's proposed amendments simply do not cure the defects warranting dismissal of her complaint. Indeed, if this court were to allow amendment, such would be futile and would certainly fly in the face of Rule 1 of the Federal Rules of Civil Procedure, which expressly provides that the procedural rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." U.S.C.S. Court Rules, Rules of Civil Procedure, Rule 1 (Law. Co-op. 1984).

Therefore, having fully reviewed the briefing herein, the court finds that plaintiff's motion to amend should be summarily denied.

E. Plaintiff's Requests for Judicial Notice, Sanctions and Deferral

On June 13, 1991, Mrs. Farr filed a Request for Judicial Notice; Supplemental Opposition to United States' Motion for Protective Order; Request for Sanctions. And, on July 22, 1991, Mrs. Farr filed a Request for Judicial Notice of United States' Failure to Comply with Evidence Rule 1006; Request for Deferral of consideration of United States' Summary Judgement [sic] Motion. The court has fully reviewed these documents and has noted their content. Notwithstanding such review, the court finds that these documents provide no basis for altering the reasoning behind the rulings previously reached

herein. Accordingly, these filings have been noted; and, to the extent Mrs. Farr has requested this court to impose sanctions or to defer ruling on the dispositive motion filed by the United States, her requests shall be denied.

III. ORDER

Based on the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the United States' Motion to Dismiss or in the Alternative for Summary Judgment, filed on February 6, 1991, should be, and is hereby, GRANTED IN PART and DENIED IN PART. To the extent it seeks dismissal of the above entitled action, the motion is granted and, therefore, this action should be, and is hereby, DISMISSED. However, to the extent the motion seeks summary judgment, it should be, and is hereby, DENIED.

IT IS FURTHER ORDERED that the United States' Motion for Protective Order, filed on March 29, 1991, should be, and is hereby, DEEMED MOOT.

IT IS FURTHER ORDERED that United Airlines' motion to dismiss filed on April 9, 1991, should be, and hereby, GRANTED; however, to the extent United Airlines seeks attorneys's fees incurred herein, at this juncture such request shall be DENIED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that plaintiff's Motion for Leave to Amend Complaint and Add Parties, filed on July 22, 1991, should be, and is hereby, DENIED.

IT IS FURTHER ORDERED that plaintiff's Request for Judicial Notice; Supplemental Opposition to United States' Motion for Protective Order; Request for Sanctions, filed on June 13, 1991, has been NOTED; and, to the extent plaintiff requests sanctions, such request should be, and is hereby, DENIED.

IT IS FURTHER ORDERED that plaintiff's Request for Judicial Notice of United States' Failure to Comply with

Evidence Rule 1006; Request for Deferral of consideration of United States' Summary Judgement [sic] Motion, filed on July 22, 1991 has been NOTED and, to the extent it seeks a deferral of consideration of the United States' Summary Judgment Motion [and/or Motion to Dismiss], such request should be, and is hereby, DENIED.

DATED this 20 day of August, 1991.

/s/

HAROLD L. RYAN
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATE COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICIA B. FARR,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; UNITED AIR LINES, INC.,

Defendants-Appellees.

_____/

No. 91-36317

ORDER DENYING PETITIONS FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

Before: TANG, KOZINSKI, and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny the petitions for rehearing filed by appellant and by each of the appellees. The suggestion of United Airlines, Inc. for rehearing en banc has been circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petitions for rehearing are DENIED and the suggestion of United Airlines, Inc. for rehearing en banc is REJECTED.

FILED
JUN 21 1993
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

APPENDIX B---STATUTES

26 U.S.C. 6103(a): Confidentiality and Disclosure of Returns and Return Information.

Returns and return information shall be confidential, and except as authorized by this title---

(1) No officer or employee of the United States, shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

26 U.S.C. 6103(k)(6): Disclosure by Internal Revenue Officers and Employees For Investigative Purposes.

An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax liability, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

26 U.S.C. 6213(a): Restrictions Applicable to Deficiencies; Petition to Tax Court.

Within 90 days ... after the notice of deficiency authorized in section 6212 is mailed ... the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no

assessment of a deficiency in respect of any tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, ... Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court including the Tax Court.

26 U.S.C. 6303(a): Notice and Demand For Tax

Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days after making the assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

26 U.S.C. 6331: Levy and Distraint

(a) Authority of secretary.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.

26 U.S.C. 7431: Civil damages for unauthorized disclosure of return or return information.

(a) In General

(1) If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

28 U.S.C. 2410: Actions affecting property on which United States has lien.

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter---

(1) to quiet title to, real or personal property on which the United States has or claims a mortgage or other lien.

28 U.S.C. 2463. Property taken under revenue law not repleviable.

All property taken under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

Supreme Court, U.S.
FILED
NOV 22 1993
OFFICE OF THE CLERK

No. 93-442

In the Supreme Court of the United States

OCTOBER TERM, 1993

PATRICIA B. FARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. 2410 authorizes suit against the United States to quiet title to property to which the government holds title, rather than a lien.

2. Whether the disclosure of federal tax return information pursuant to tax collection efforts is actionable in a suit for damages under 26 U.S.C. 7431.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-442

PATRICIA B. FARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-22) is reported at 990 F.2d 451. The order of the district court (Pet. App. 23-32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1993. The petitions for rehearing were denied on June 21, 1993. Pet. App. 33. The petition for a writ of certiorari was filed on September 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner did not file federal income tax returns for the years 1979 through 1982. The Internal Revenue Service assessed petitioner's tax liability and issued notices of levy to her employer, United Air Lines. Pursuant to the notices of levy, United Air Lines paid a portion of petitioner's wages over to the United States (Pet. App. 12).

Petitioner then commenced this suit in district court. She asserted that the levies on her wages were procedurally invalid because the IRS had failed to issue notices of deficiency, notices of assessment and demand for payment, and notices of seizure (Pet. App. 25). She also alleged that the IRS had improperly disclosed tax return information to her employer in issuing the notices of levy (*ibid.*). Petitioner requested a return of the funds collected by the IRS, a declaration that the IRS's notice of tax lien was void, a declaration that the IRS levies were void, an injunction against further levies, and damages (under 26 U.S.C. 7431) for the allegedly unauthorized disclosure of her confidential tax information (Pet. App. 25).

The district court dismissed the action. The court noted that the Form 4340 Certificates of Assessments and Payments demonstrated that all of the required notices had been sent by the IRS in assessing petitioner's taxes and levying upon her wages (Pet. App. 26-27). The court therefore concluded that petitioner had failed to state a cause of action under 28 U.S.C. 2410 against the United States (Pet. App. 27).

2. The court of appeals affirmed in part and reversed and remanded in part (Pet. App. 12, 22). The court held that, to the extent that petitioner sought

an injunction and declaratory relief against the collection of her taxes, her action was barred by 26 U.S.C. 7421 (Pet. App. 13).[1] The court also held that petitioner's action to quiet title to her wages was not authorized by 28 U.S.C. 2410 with respect to wages that had already been paid over to the government (Pet. App. 14).[2] The court of appeals held, however, that 28 U.S.C. 2410 did authorize petitioner's challenge to the continuing levy upon her prospective wages (*ibid.*). The court therefore remanded the case to the district court for consideration of the merits of petitioner's challenge to the continuing levy on her wages (Pet. App. 22).

The court of appeals further held that the district court properly dismissed petitioner's claim that her confidential tax information was wrongfully disclosed in the notices of levy. The court concluded that the information disclosed in the notices of levy was necessary to the collection activity of the government and that the disclosures therefore fell "squarely within the exemption" provided in Section 6103(k)(6) of the Internal Revenue Code (Pet. App. 17).

ARGUMENT

1. It is well settled that the United States may not be sued without its consent and that the terms of its consent define the court's jurisdiction. *United States*

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[1] 26 U.S.C. 7421 provides, in relevant part, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." See also 28 U.S.C. 2201(a).

[2] Petitioner's remedy for taxes already collected would be a refund action, in which she would be required to establish that the taxes in fact were not owed.

v. *Dalm*, 494 U.S. 596, 608 (1990). Any waiver of the government's immunity to suit must be explicit and is strictly construed. *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *Soriano* v. *United States*, 352 U.S. 270, 272 (1957). When the United States has not consented to suit, the action should be dismissed. See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *Elias* v. *Connett*, 908 F.2d 521, 527 (9th Cir. 1990).

Petitioner brought this suit to quiet title to her wages, a part of which the government had seized pursuant to a tax levy. 28 U.S.C. 2410 permits an action to be brought against the United States to quiet title to "real or personal property on which the United States has or claims a mortgage or other lien." In such "quiet title" actions, taxpayers may challenge the procedural regularity of liens, seizures and sales of property in which the United States claims a lien. In such actions, however, taxpayers may not challenge the substantive validity of the underlying tax assessment. See, *e.g.*, *Guthrie* v. *Sawyer*, 970 F.2d 733, 735 (10th Cir. 1992); *Geiselman* v. *United States*, 961 F.2d 1, 4 (1st Cir.), cert. denied, 113 S. Ct. 261 (1992); *Hughes* v. *United States*, 953 F.2d 531, 537-539 (9th Cir. 1992); *Stoecklin* v. *United States*, 943 F.2d 42, 43 (11th Cir. 1991); *Kulawy* v. *United States*, 917 F.2d 729, 733 (2d Cir. 1990); note 2, *supra*.

28 U.S.C. 2410 authorizes suits only when the United States "has or claims" a lien on the property. *Ibid.* When the government has already obtained title and possession of the property, as contrasted with a mere lien interest, Section 2410 does not authorize suit. See *Bertie's Apple Valley Farms* v. *United*

States, 476 F.2d 291, 292 (9th Cir. 1973); *Bank of Hemet* v. *United States*, 643 F.2d 661, 665 (9th Cir. 1981); *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 737 (5th Cir. 1980); *Hughes* v. *United States*, 953 F.2d at 538. When, as here, the wages of a delinquent taxpayer have been paid over to the government, the United States has title, not merely a lien, in the money that has been paid over. See *Hughes* v. *United States*, 953 F.2d at 538; *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d at 737. The court of appeals therefore correctly held (Pet. App. 14) that the quiet title provisions of 28 U.S.C. 2410 are not applicable to petitioner's claim for recovery of funds paid to the United States. The taxpayer's remedy in this situation is a tax refund suit under 26 U.S.C. 7422, which may be commenced only after full payment of the tax and the filing of an appropriate administrative claim for refund. See also note 2, *supra*.

Contrary to petitioner's contention (Pet. 6-7), the decision in this case is not inconsistent with this Court's holdings in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983), and *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985). In those cases, the Court held that the government's seizure of property does not transfer ownership but instead brings the property into the government's legal custody. This custodial relationship allows the government to sell the property to satisfy the taxpayer's delinquent tax obligation. Ownership of the property is transferred only when the property is sold at tax sale. See *United States* v. *Whiting Pools, Inc.*, 462 U.S. at 211. It is not necessary, however, for the government to conduct a sale when money is

seized to satisfy the taxpayer's debt. Because no further steps are necessary for the government to receive payment of its debt, the seizure of money is sufficient by itself to establish that the government's interest is not merely a "lien" interest. See, *e.g.*, *Hughes* v. *United States*, 953 F.2d at 538.

Petitioner also errs in contending (Pet. 6) that the decision in this case conflicts with *Kulawy* v. *United States*, 917 F.2d 729 (2d Cir. 1990). In that case, the Second Circuit held that the question whether Section 2410 authorizes suit in a particular case must be determined upon the facts that exist at the time the lawsuit is commenced. The court concluded that there was jurisdiction over the taxpayer's quiet title action in *Kulawy* because, at the time that lawsuit was commenced, the government had only a lien on the property. 917 F.2d at 733-734. In the present case, by contrast, when petitioner commenced her suit, the government did not hold merely a lien interest in her wages but had possession and title to the funds that she sought to recover.[3] The holding in the present case that a quiet title action will not lie with respect to funds that have come into the possession of the United States *before* the lawsuit is commenced does not conflict with the decision in *Kulawy*.[4]

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[3] Petitoner errs in asserting (Pet. 5-6) that the decision in this case conflicts with the same court's earlier decision in *Goodwin* v. *United States*, 935 F.2d 1061 (9th Cir. 1991). *Goodwin* involved the seizure of real property that had not been sold at the time suit was commenced. Petitioner's claim of an intra-circuit conflict would not, in any event, warrant further review by this Court.

[4] The decision in *United States* v. *Sullivan*, 333 F.2d 100 (3d Cir. 1964), concerned the IRS's levy upon a delinquent

2. Section 6103(k)(6) of the Internal Revenue Code authorizes the disclosure of taxpayer return information "to the extent that such disclosure is necessary in obtaining information * * * with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title." 26 U.S.C. 6103(k)(6). As the court of appeals correctly concluded, the Internal Revenue Service issued the notices of levy involved in this case to obtain information "necessary to the collection activity" and the notices thus fell "squarely within the exemption under section 6103(k)(6)" (Pet. App. 17).[5]

The cases that petitioner identifies as in conflict with the decision in this case (Pet. 9) involve distinctly different factual situations. For example, *Rorex* v. *Traynor*, 771 F.2d 383 (8th Cir. 1985), concerned the question whether Section 6103(k)(6) could authorize a disclosure in a notice of tax levy that was issued at a time when the taxpayers were *not* delinquent in any tax obligation. In that context, when there was no lawful basis to seek collection of taxes from a taxpayer who had "not neglected or

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taxpayer's interest in unmatured insurance policies in a lien foreclosure action. That decision does not address the question whether the IRS obtained a title interest in the property it seized.

[5] Treasury regulations authorize any revenue officer to disclose return information in connection with official duties relating to any collection activity, in order to obtain information necessary "to apply the provisions of the Code relating to establishment of liens against such assets, or levy on, or seizure, or sale of, the assets to satisfy any such liability" (26 C.F.R. 301.6103(k)(6)-1(b)(6)).

refused to pay any tax," the court concluded that Section 6103(k)(6) could not authorize a disclosure of return information.[6] 771 F.2d at 386. And, in *Rodgers* v. *Hyatt*, 697 F.2d 899 (10th Cir. 1983), the court addressed the factually distinct question whether information that had previously been disclosed nonetheless remained subject to "the confidentiality requirements of § 6103" (697 F.2d at 902). Other courts that have addressed the question presented here have reached conclusions consistent with the court's holding in this case. See *Maisano* v. *United States*, 908 F.2d 408 (9th Cir. 1990); *Flippo* v. *United States*, 849 F.2d 604 (4th Cir. 1988) (Table), aff'g per curiam 670 F. Supp. 638 (W.D.N.C. 1987).

3. In any event, the case presented on this petition is in a wholly interlocutory posture. The court of appeals remanded the case to the district court for further consideration under 28 U.S.C. 2410 of petitioner's challenge to the continuing levy on her wages. See Pet. App. 16. Further review at this time of the interlocutory decision of the court of appeals is not warranted. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

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[6] By contrast, the court noted in the present case that, while petitioner claims that she "did not receive" the notices that are to be issued before tax collection efforts are commenced (Pet. App. 16), the IRS presented proof that it had issued them (*id.* at 14).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1993

Supreme Court, U.S.
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No. 93-442

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PATRICIA B. FARR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE NINTH CIRCUIT COURT OF APPEAL

REPLY TO OPPOSITION

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In its opposition to Farr's petition for certiorari, the Respondents claim this Court should decline review of this case because it "is in a wholly interlocutory posture" due to a partial reversal and remand by the appellate court. The opposition also makes several unsupported assertions, and some outright misrepresentations regarding this case. Petitioner feels compelled to briefly address each of these matters.

A. Review of The Affirmed Portion of The Current Decision Cannot Be Made Later.

First of all, Respondent contends this Court should totally decline review because of the partial reversal and remand of a portion of petitioner's suit (Opp. 8). However, Respondent has failed to explain just how, at a later date, this Court could possibly review the portion of the appellate decision which affirmed the trial court now. Such affirmances are presumably final decisions, and would simply not be part of any future judgement on appeal.

According to the Rules of this court (Rule 13.1), review of a judgement must be sought within 90 days of it being rendered. Therefore, under the Rules of this Court (and Respondent's contention), when there is a partial reversal, the decision(s) or issues an appellate court affirms would somehow have to be raised again in a future decision in order to be reviewable by this Court. Just how or why an appellate court would again render a decision on such matters in the future appears to be a mystery. However, that is exactly what would be required in order for this Court to review such issues. Therefore,

Respondent's contention about denying certiorari because this case is in an "interlocutory posture" should be rejected.

B. Respondents' Argument Misrepresents The Appellate Cases Cited And Conflicts With Itself.

Respondents also contend that this Court's decisions in *United States v. Whiting Pools*, 462 U.S. 198 (1983) and *United States v. National Bank of Commerce*, 472 U.S. 713 (1985) do not conflict with the appellate court decision made in the case at bar. Respondents apparently contend that the United States immediately obtains a 'title' interest in property levied by the IRS when that property is not of a type 'subject to being sold'. (Opp. 5-6). Based on this theory, Respondents contend that the United States may not be sued under 28 U.S.C. §2410(a) because no more lien exists. Respondents cite no direct authority for their theory of title transfer, and Petitioner submits such a contention is in direct conflict with statements made in the above decisions of this Court. In both cases, this Court explicitly stated that the levy provisions of the Internal Revenue Code do not transfer ownership to the IRS.

Further, in an attempt to distinguish the Second Circuit's decision in *Kulawy v. United States*, 917 F.2d 729 (1990), Respondents misrepresent the facts of that case by claiming "the government had only a lien on [kulawy's] property." (Opp. 6). In fact, the property had been *seized* by the IRS *before* the suit was filed. *Id.* at 731. Even though the property had been seized prior to the suit (and auctioned while the suit was

pending), the court ruled the suit was proper under §2410(a) because there was a lien on it. *Id.* at 733-4.

Respondents also misrepresent the facts of the case in *Goodwin v. United States*, 935 F.2d 1061 (9th Cir. 1991) by claiming the property had not been sold at the time suit was commenced. (Opp. 6, ftnote 3). In fact, the property had been sold, and an IRS deed had been recorded for the government, a full 2 years before the suit was initiated. 935 F.2d at 1063. Nonetheless, the 9th Circuit held suit was proper under §2410(a).

Respondents can apparently cite no direct authority for their contention that an IRS levy automatically transfers 'title', and thereby removes a lien on property levied/seized by the IRS. Moreover, Respondents' misrepresentations of the facts of the conflicting appellate cases they sought to distinguish should indicate a lack of merit in their argument.

Although this Court has previously stated that an IRS levy does not transfer ownership in levied/seized property, there has apparently been no decision by it as to whether or not a lien still exists on such property. As set forth in Petitioner's petition, the appellate courts are in conflict over this issue. Moreover, Respondents' statement that 'quiet title' actions may be used to "challenge the procedural regularity of ... seizures" (Opp. 4) appears to contradict the argument in the opposition.

Respondents also contend that Farr's remedy is a tax refund suit under 26 U.S.C. 7422. (Opp. 5). However, Respondents apparently overlook the fact that part of

Farr's current suit was exactly for that, and the district court dismissed the entire action without even commenting on that cause, with the appellate court affirming the dismissal, again, without comment. (Pet. 4-5). Although part "A" of Farr's petition was devoted entirely to this dismissal, Respondent has failed to even address it. Therefore, a refund action is apparently no remedy at all since it has already been ignored and dismissed by the courts.

C. Unauthorized Disclosures.

In arguing against Farr's position regarding unauthorized disclosures, Respondents again make misrepresentations. Contrary to Respondent's contention that the appellate court ruled that required notices had been issued prior to collection in this case (Opp. 8, ftnote 6), the court in fact stated "we do not hold that Farr did or did not receive notices, nor do we hold that the IRS procedures were or were not defective." (Pet. 16) 990 F.2d at 455. Thus, neither the legality of the collection action, nor Petitioner's alleged tax delinquency has ever been determined. Moreover, since this case came to appeal as a result of a dismissal for failure to state a claim, the allegations of Petitioner's complaint in the trial court are the only relevant consideration, and they must be taken as true. According to those allegations, the IRS totally failed to comply with the notice and assessment requirements of the Internal Revenue Code (Pet. 2), a due process violation. Therefore, no authority existed for any collection action or disclosures.

Respondents also appear to take the same position

as Petitioner in that the purpose of 26 U.S.C. 6103(k)(6) is to allow disclosures in order to *obtain* information. (Opp. 7, and ftnote 5). However, Respondents totally fail to explain how the issuance of lien and levy notices would be for the purpose of *obtaining information.* Such notices are most obviously for the purpose of collection, not obtaining information. Therefore, §6103(k)(6) could not be any exception for making the disclosures. Moreover, even if the section did allow for the type of disclosures at issue here, it could not possibly allow for disclosures made in pursuit of unauthorized and illegal collection actions.

CONCLUSION

Respondents' opposition appears to be full of misrepresentations regarding this case, and other cases related to it. Petitioner finds it hard to believe that the number of misrepresentations made in the opposition were accidental or unintentional. Therefore, the opposition should be given little weight, if any.

Petitioner has demonstrated that, absent her suit to quiet title, she has no remedy for addressing the illegal collection actions of the IRS. Her refund cause was summarily dismissed without comment, and the dismissal affirmed on appeal, again, without comment. Respondents have pointed to no other remedy. Moreover, Respondents are apparently unable to cite any direct authority for their theory of title transfer to the IRS due to a mere levy/seizure, and this Court has previously decided to the contrary. Accordingly, this Court should grant certiorari and reverse the appellate

court.

Respectfully submitted,
Patricia B. Farr, In Pro Per

December 1993